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IN THE SUPREME COURT
OF THE UNITED STATES

No. , October Term, 1982

DENNIS CALLAWAY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF WISCONSIN SUPREME COURT (AND APPENDIX)

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QUESTIONS PRESENTED

I. DOES THE FOURTH AMENDMENT PROHIBIT THE POLICE FROM WARRANTLESS SEIZURE OF AN AUTOMOBILE FOR NON-INVESTIGATORY PURPOSES FOLLOWING ITS DRIVER'S ARREST ON A TRAFFIC OFFENSE, ABSENT SOME SHOWING OF REASONABLE CAUSE?

II. ASSUMING THE IMPOUNDMENT OF AN AUTOMOBILE TO BE PROPER, DOES THE FOURTH AMENDMENT PROHIBIT THE POLICE FROM CONDUCTING A WARRANTLESS ROUTINE INVENTORY SEARCH ABSENT PERMISSION FROM THE OWNER OR PERMISSIVE USER WHEN HE/SHE IS PRESENT AND ABLE TO GIVE SUCH CONSENT?

III. IS ENTRY INTO A LOCKED GLOVE COMPARTMENT DURING A ROUTINE INVENTORY SEARCH OF AN IMPOUNDED AUTOMOBILE UNREASONABLE IN SCOPE UNDER THE FOURTH AMENDMENT?

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v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF WISCONSIN SUPREME COURT (AND APPENDIX)

The petitioner, Dennis Callaway, prays that a writ of certiorari issue to review the judgment of the Wisconsin Supreme Court, entered March 26, 1982.

OPINIONS BELOW

The trial court entered a pretrial order suppressing marijuana seized from Mr. Callaway's automobile. The Wisconsin Court of Appeals affirmed the order in State v. Callaway, 103 Wis.2d 389, 308 N.W.2d 897 (Ct. App. 1981), reproduced in the Appendix at 101-108. The

Wisconsin Supreme Court reversed both lower courts, 106 Wis.2d 503, 317 N.W.2d 428 (1982), reproduced in the Appendix at 109-129.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Wisconsin Supreme Court, reversing the pretrial suppression order, was entered March 26, 1982.

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts are undisputed.

Petitioner (hereinafter "Mr. Callaway") was charged by criminal complaint with possessing a controlled substance, tetrahydracannabinol, with intent to deliver, contrary to sec. 161.41(1m)(b), Wis. Stats. The sole issue herein is whether the police properly seized the marijuana which formed the basis for the charge. The following facts were adduced at the preliminary hearing ("P.H.") and at the suppression hearing ("S.H.").

Mr. Callaway was arrested in West Bend, Wisconsin, on May 3, 1979, at 7:13 p.m. on an outstanding traffic warrant. At the time, Mr. Callaway was the sole driver-occupant of the

vehicle he was driving. The arresting officer, Michael Quick, advised Mr. Callaway the bond for this offense was $51.00, which Mr. Callaway was unable to immediately post (S.H. 4-7).

Mr. Callaway pulled his car over, in response to Officer Quick's signal, in a no-parking zone. However, lawful parking existed, until 2:00 a.m., within twenty (20) feet of that site.

According to Officer Quick, the police department policy was that every vehicle whose driver was arrested was subject to impoundment, whether or not illegally parked, unless someone else was available to operate the car (P.H. 4, 9-10; S.H. 16). In other words, even if Mr. Callaway had been pulled over in a legal parking zone, his car would still have been towed.

Officer Quick asked if Mr. Callaway could secure another driver for the car, but Mr. Callaway stated he did not any one available "at that time" (S.H. 8, 16-17). Officer Quick did not allow Mr. Callaway any phone calls to find another driver (S.H. 17). Officer Quick could

not deny that Mr. Callaway requested five minutes to provide the $51.00 bail (S.H. 13).

Officer Quick then offered Mr. Callaway the option of either paying to have his car towed to the impounding lot, or having the police drive it there. Officer Quick "indicated to him if we had the keys it would be easier, otherwise we'd call a tow truck and he'd have to pay for it" (P.H. 10; S.H. 8, 22). Under either option, the car would be under police impoundment; Officer Quick did not offer Mr. Callaway the option of having the car towed to his residence or some other place (S.H. 32).

Seeing on the rear seat a "bong" (a pipe Officer Quick associated with marijuana use), the officer called for back-up assistance (P.H. 4). The car was then driven by the police to the police garage where it was subjected to a complete inventory search (S.H. 32). The search included entry into the locked glove compartment, with a key, where some marijuana was found in a plastic bag (S.H. 34).

The car was then taken to the police impoundment lot which, though secured at night had

not prevented cars on the lot from suffering "frequent acts of vandalism and theft." 106 Wis.2d at 517; 317 N.W.2d at 436.

Following the suppression hearing, the trial court ordered the evidence seized during the inventory search suppression. The court of appeals affirmed; the supreme court reversed. This petition for a writ of certiorari is from the judgment of reversal of the Wisconsin Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NOT SPECIFICALLY ADDRESSED THE QUESTION OF WHETHER THE FOURTH AMENDMENT REQUIRES REASONABLE CAUSE FOR THE NON-INVESTIGATORY SEIZURE OF AN AUTOMOBILE. THE WISCONSIN SUPREME COURT'S DECISION CREATES A CONFLICT AMONG THE LOWER COURTS ON THIS POINT, THEREBY NECESSITATING RESOLUTION BY THIS COURT. FURTHERMORE, THE LOWER COURT'S DECISION IS AT ODDS WITH WELL-ESTABLISHED LAW ENUNCIATED BY THIS COURT RELATING TO CONSENT TO SEARCH.

A. The lower court ratified the impoundment of Mr. Callaway's automobile without a showing of any necessity, thus conflicting with numerous other lower court decisions.

The West Bend police rules require seizure of an automobile where the arrestee-driver is unable to immediately secure an alternative

custodian for the car. The policy lays down a hard-and-fast rule which ignores, indeed prohibits the police from even considering, whether there is any necessity (e.g., traffic hazard) for the seizure.

The state conceded that Mr. Callaway's car could reasonably have been left parked lawfully at the scene, but claimed that, "[i]t is not unconstitutional for the police to fail to offer other alternatives. These are decisions which are better left to the judgment of police department officials than to the courts. A policy of offering only the alternative of having someone move the car is not facially unreasonable." State's brief-in-chief in Wisconsin Supreme Court, p. 32.

The Wisconsin Supreme Court effectively adopted the state's position, despite the rulings of the lower courts that the seizure was illegal because it was unsupported by any necessity. There is no evidence in this record to support an inference that the automobile presented any kind of traffic or other hazard to

the public, or that any danger was presented to it.

The threshold issue is thus whether Mr. Callaway's car was lawfully seized. For reasons discussed below, the Wisconsin Supreme Court's treatment of this threshold issue is irreconcilably odds with the analysis employed by the vast majority of lower courts to deal with this issue.

While this court has sanctioned the use, under some circumstances, of an inventory search of a lawfully impounded automobile, South Dakota v. Opperman, 428 U.S. 364 (1976), it has never discussed the precise issue of what constitutes a lawful impoundment. In Opperman there was no challenge to the seizure of the illegally-parked and long-abandoned vehicle. As this court noted, "[t]he Vermillion police were indisputably engaged in caretaking search of a lawfully impounded automobile." 428 U.S. at 375. See also State v. Goodrich, 256 N.W.2d 506, 509 (Minn. 1977) ("There was no dispute as to the propriety of the act of impoundment itself [in

Opperman]"; and Benavides v. State, 600 S.W.2d 809, 911 (Tex. Cr. App. 1980) ("The Supreme Court in Opperman and in decisions since then has failed to earnestly discuss what is necessary for an impoundment of automobile to be considered a 'reasonable seizure.')

The inventory search "is a relatively new exception to the warrant requirement and is still in a sensitive, developing state. ... It is apparent from the case law that there is still some confusion among law enforcement officers, prosecutors, and judges about the nature and purpose of this unique type of warrantless search." Miller v. State, 403 So.2d 1307, 1311 (Fla. 1981). Given the explosion of cases dealing with this emergent doctrine, this court should offer a guiding hand while the doctrine is still in a sensitive, developing stage, particularly in light of the serious departure of Callaway from recent trends.

Virtually all cases - save perhaps Callaway- to address the issue in recent years have concluded that, prior to a non-investiga-

tory impoundment, the police must have "reasonable cause" (i.e., "substantial need") for the seizure. E.g., State v. Houser, 45 Wash.2d 142, 622 P.2d 1218 (1980); State v. Bales, 15 Wash. App. 834, 552 P.2d 688, 689 (1976); Drinkard v. State, 584 S.W.2d 650, 653 (Tenn. 1979); State v. Slockbower, 79 N.J. 1, 397 A.2d 1050, 1053 (1979); Nealy v. State, 400 So.2d 95, 96-97 (Fla. App. 1981); Altman v. State, 335 So.2d 626, 628 (Fla. App. 1976); Arrington v. United States, 382 A.2d 14, 18 (D.C. App. 1978); People v. Nagel, 17 Cal. App.3d 492, 496, 95 Cal. Rptr. 129, 132 (1971); State v. Goff, 272 S.E.2d 457, 461, n. 6 (W. Va. 1980); cf. Benavides v. State, 600 S.W.2d 809, 811 (Tex. Cr. App. 1980). Accord, Moylan The Inventory Search of an Automobile: A Willing Suspension of Disbelief, 5 U. Balt. L.R. 203, 218 1976).

A leading fourth amendment commentator similarly posits that impoundment of an arrestee's vehicle is unreasonable unless the police first ask the arrestee for reasonable alternative dispositions and attempt compliance

with same. 2 La Fave, Search and Seizure, § 7.3(c), pp. 559-560. Moreover, consistent with the idea that reasonable cause must underly an impoundment, La Fave argues that the driver's wish to leave the car lawfully parked at the scene should be respected when reasonable. Id. Accord, Rule 603(B), Model Rules for Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles (Ariz. St. U. College of Law and Police Foundation 1974) cited in dissent, 106 Wis.2d at 533-534, 317 N.W.2d at 443. La Fave further posits that immediate seizure is improper when - as here - the driver is arrested on a minor traffic offense, at least until the arrestee has had a reasonable opportunity to post bail. Id., p. 556.

Opperman itself suggests that impoundment may be limited to instances where "vehicles [are] impeding traffic or threatening public safety and convenience." 428 U.S. at 369. Certainly nothing in Opperman or any other decision by this Court hints that impoundment is proper where unsupported by some police need.

In the present case, the Wisconsin court of appeals properly paid obeisance to this universally recognized principle of necessity. 103 Wis.2d at 399-402, 308 N.W.2d at 902-904. The Wisconsin Supreme Court, on the other hand, sloughed over this threshold issue without discussing it in any meaningful manner. 103 Wis.2d at 513-514; 317 N.W.2d at 434.[1] The Callaway court's failure to discuss necessity for the seizure distinguishes the case from all other impoundment cases and seriously impedes development in this area of the fourth amendment.

The key feature to this case is that the state has never claimed that the seizure was justified under some theory of "reasonable necessity." In fact, the West Bend policy mandates the seizure of every car whose driver has been arrested, where an alternative driver is not immediately available. Thus, the police did not, and could not have by local policy, explored

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[1] The court's ruling appears to be based primarily on a consent theory, which is discussed in the section below.

options to seizure, even to determine whether some necessity existed for the seizure. "Necessity" was conferred by a rigid, unyielding policy which works a predetermined result in every West Bend traffic arrest, including Mr. Callaway's.

The Callaway court did note, in cursory fashion, certain conclusions which arguably might support a finding of necessity. 102 Wis.2d at 513; 317 N.W.2d at 434. These matters include: (1) the possibility of vandalism to the car and consequent negligence suit against the police; (2) the possibility the car would have remained illegally parked on the street after 2:00 a.m.; (3) the absence of any indication the seizure and search were pretextual. Mr. Callaway discusses these matters in order.

There is no evidence whatsoever that Mr. Callaway's car - which was pulled over within sight of the police department - would have been subjected to vandalism. The court's conclusion is based on mere speculation.

Not only are there no facts to support the inference of vandalism, the court's conclusion relating to a possible negligence suit is without legal support. No authority is cited for the proposition the police might have incurred any liability for the car. However, as La Fave notes, if the police do not seize the car, they do not assume responsibility for it or its contents. 2 Search and Seizure, § 7.3, p. 560. See also State v. Hardman, 17 Wash. App. 910, 567 P.2d 238, 242 (1977): "[T]he absence of circumstances to justify an impoundment should be a conclusive determination to any claim against the police for vandalism or theft of the vehicle after it was locked and allowed to remain legally parked." Accord, State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977); Mozetti v. Superior Court, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84, 88-89 (1971).

Moreover, if such a threat of vandalism in fact existed, there is no reason why the police could not have asked Mr. Callaway to assume any risk and waive any claim against the police.

Cf. People v. Miller, 7 Cal.3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972).

Ironically, the only evidence adduced as to vandalism related to break-ins at the impoundment lot. 106 Wis.2d at 517; 317 N.W.2d at 436. In fact, this threat of damage to the vehicle served as the justification for the ensuing inventory search. If, then, the police were not exposed to liability before the seizure, they certainly were once they assumed custody of the car and removed it to a place known to present hazards. The vandalism justification thus takes it place alongside the argument that the village had to be destroyed in order to save it.

Recent case law is unanimous that, if the arrestee's car can be left lawfully parked at the scene, impoundment is impermissible. G.B. v. State, 339 So.2d 696 (Fla. App. 1976); State v. Jenkins, 319 So.2d 91, 94 (Fla. App. 1975); Session v. State, 353 So.2d 854, 855 (Fla. App. 1977); State v. Houser, 45 Wash.2d 143, 622 P.2d 1218, 1224 (1980); State v. Bales, 15 Wash. App. 834, 552 P.2d 688, 690 (1976); Slockbower; State

v. Ercolano, 79 N.J. 25, 397 A.2d 1062, 1067 (1979); State v. Crosby, 403 So.2d 1217 (La. 1981); People v. Nagel, 17 Cal. App.3d 492, 497, 95 Cal. Rptr. 129, 132-133 (1971); People v. Landa, 30 Cal. App.3d 489, 491, 106 Cal. Rptr. 329, 331-332 (1973); State v. Darabis, 159 Ga. App. 121, 282 S.E.2d 744 (1981); Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974); Manalansan v. State, 45 Md. App. 667, 415 A.2d 308 (1980); cf. United States v. Pannell, 256 A.2d 925 (D.C. App. 1969) (car parked on police lot). Accord, 2 Search and Seizure, § 7.3, p. 559 (if car can be left lawfully parked at scene and driver requests it, seizure would be improper); Model Rule 603(B).

These cases cannot be meaningfully distinguished from the present one. Their shared, irreducible principle is that seizure must be predicated on some reasonable cause. No such cause existed, or was even claimed by the state to exist, in the present case. Mr. Callaway's car could have been left lawfully parked at the scene during his temporary absence, without im-

peding traffic or causing any sort of hazard to the public.

The fact that parking was illegal after 2:00 a.m., some seven hours after the arrest, is unimportant. As noted by one court:

> This argument is without merit. First of all no violation of the ordinance had yet occurred. We cannot agree that a pre-violation seizure of an automobile is permissible. Furthermore there was no testimony that it was standard procedure to impound a vehicle for this violation or whether the issuance of a citation was the usual procedure.

Benavides v. State, 600 S.W.2d 809, 812 (Tex. Cr. App. 1980).[2/]

These matters are further irrelevant for the simple reason they were not relied on by the police. Seizure was accomplished pursuant to a departmental policy which purportedly protects against arbitrary incursions into citizens' privacy. Opperman, 428 U.S. at 374-375. The

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2/ Mr. Callaway was pulled over in an illegal parking zone. However, the state conceded that it could easily been moved twenty feet to a lawful zone. State's brief, p.32. Moreover, case law is unanimous that in such situations the car should be moved to the lawful zone and left parked. Dixon, 327 A.2d at 527; Nagel, 95 Cal. Rptr. at 133; Bales, 552 P.2d at 690.

police themselves saw no possibility of vandalism, and were not concerned that the car might have been illegally parked at some future time. They were prohibited, under the policy, from evaluating such conditions.

The real issue here is whether West Bend's rigid policy is reasonable under the fourth amendment. The very inflexibility of the policy raises a "suspicion . . . that the policy is intended only as a subterfuge for a warrantless search without probable cause." Crosby, 403 So.2d at 1220 (invalidating seizure based on "overly restrictive" departmental policy permitting only family members to retrieve arrestee's car, where car could have been safely parked a short distance from the arrest).[3/]

As shown above, the decided trend of recent cases is to encourage the police to leave, where possible, an automobile lawfully parked at the

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3/ The Callaway court claimed that Mr. Callaway did not contend the seizure was pretextual. This is not true. Brief in Wisconsin Supreme Court, p. 21. See also dissent, 106 Wis.2d at 523, n. 2, 317 N.W.2d at 438, n.2.

scene of the driver's arrest. Callaway represents a significant departure from this line of authority, and in so doing creates bad policy as well as bad law.

First, Callaway ignores the privacy rights of automobile owners. As shown below, under Wisconsin law, the police may pry into virtually every area of an impounded vehicle, locked or unlocked, without the owner's consent. Seizure of a car, then, signifies the commencement of a serious intrusion into an owner's private compartments. While all impoundment cases at least attempt to balance police need against owner's privacy, the Callaway court inexplicably made no such attempt. E.g., Slockbower, 397 A.2d at 1053; State v. Hardman, 117 Wash. App. 910, 567 P.2d 238, 240 (1977). (The Callaway court's only venture into this area was to hold that any expectation of privacy in a motor vehicle is less than that attendant other types of property. 106 Wis.2d at 508-510, 317 N.W.2d at 431-432.

Second, the decision ironically will overburden the police and hamper them in performance

of their duties. As argued above, the decision will only increase rather than minimize, the exposure of the police to civil liability. Moreover, to the extent the police are encumbered by this supposedly benign procedure, they will be unable to truly protect the community from crime and other public hazards. As the dissent noted, "one-fourth to one-third of the West Bend Police officers were apparently busy with the defendant or his car for some time between 7:15 and 8: 15 p.m." 106 Wis.2d at 521, n. 1; 317 N.W.2d at 437, n. 1. The unnecessary expenditure of precious manpower is not, Mr. Callaway submits, wise policy.

If the police had sufficient personnel and time to move Mr. Callaway's car off the streets, and to conduct an intensive search, they could as easily have offered Mr. Callaway the option of having the car driven or towed to a place of his own choosing. The police were prohibited from offering such an alternative under their department policy. Assuming the removal of the car to have been necessary at all, the Callaway

court failed to discuss why the car could not have been taken to a place of Mr. Callaway's choosing. This failure is grounded in the court's failure to endow the car with any protection over its private contents, as required by the fourth amendment.

B. The decision is irreconcilable with well-established authority to the effect that "consent" cannot be demonstrated by mere acquiescence to authority.

The Callaway court placed primary reliance on a consent-theory as a basis for upholding the seizure:

> "Callaway stated that he did not know of (sic) anyone who could come to get the car at that time and, therefore, he freely waived his opportunity to avoid the impoundment." 106 Wis.2d at 512, 317 N.W.2d at 433.
>
> "We . . . hold that the facts of this case satisfy that standard as Callaway was informed that the car would be impounded if he could not suggest another driver the police could contact and he consented to the impoundment of the vehicle and voluntarily surrendered his keys to the officer." 106 Wis.2d at 513-514, 317 N.W.2d at 434, emphasis in original. 4/

4/ Consent, it should be noted was not relied on by the police, who seized the car simply because they were required to do so by policy.

Mr. Callaway does not dispute the unremarkable idea that an individual can consent to the seizure of his/her car. However, if under the present facts Mr. Callaway is held to have consented to the seizure, then the term "consent" will have been stripped of all meaning in the fourth amendment context.

The instant facts show quite clearly that any "consent" to seizure was in fact no more than mere acquiescence to lawful authority. Mr. Callaway was told that if he could not produce someone to take charge of the car, the vehicle would be seized. Mr. Callaway was not given any choice in the matter. He was not, for example, asked if he wanted the car towed or driven to his home or left parked at the scene.

This Court has consistently held that mere acquiescence to a claim of colorably lawful police coercion cannot constitute "consent" to a

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4/ (cont.)
Nor was consent argued by the state, which argued simply and solely that this policy was reasonable on its face. Thus it is not surprising that the holding conflicts with well-established rulings by this Court.

search or seizure. Lo Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979); Bumper v. North Carolina, 391 U.S. 543, 549-550 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921).

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coericon. Where there is coercion there cannot be consent.

Bumper at 549.

The Bumper rule of mere acquiescence is not limited to claims of a non-existent warrant. It extends to situations where the search or seizure is "demanded under color of office," Johnson, 333 U.S. at 13, i.e., where the individual is led to believe he has no choice in the matter:

> Coercion which will invalidate consent and render a search unreasonable in constitutional reference is not solely confined to a consent obtained by threats or force, but is equally operative in those situations where the consent is granted only in submission to a claim of authority. ... Where an officer without using physical violence or threats conveys to the defendant by affirmative misrepresentations that he has the right to search without a warrant as in the instant case, the defendant's consent

> to the search given in response to such false assertions must be regarded as the mere submission of a law abiding citizen to an officer of the law and cannot be construed as a valid waiver of his constitutional rights against search and seizure.

State v. Barlow, 320 A.2d 895, 900 (Me. 1974). Accord, United States v. Sanchez, 635 F.2d 47, 59 (2d Cir. 1980) and cites therein; United States v. Molt, 444 F. Supp. 491 (E.D. Penn.) aff'd 589 F.2d 1247 (3d Cir. 1978); Jones v. Unknown Agents of Federal Election Commission, 613 F.2d 864, 880 (D.C. Cir. 1979); United States v. Anile, 352 F. Supp. 14 (N.D. W.Va. 1973); State v. Williams, 249 S.E.2d 759 (W. Va. 1978); People v. Tenneny, 417 N.Y.S.2d 840 (1979); Little Rock Police Department v. One 1977 Lincoln Continental, 580 S.W.2d 451 (Ark. 1979); Seuss v. State, 370 So.2d 1203 (Fla. App. 1978); Doescher v. State, 578 S.W.2d 385 (Tex. Crim. App. 1979).

Due to ambiguous language in the state court's opinion, Mr. Callaway perceives two possible bases for a finding of consent: (1) the failure to proffer an immediately accessible driver; (2) the relinquishment of the keys. The

first basis hardly seems appropriate to a consent analysis. Whether or not another driver was at hand was entirely beyond Mr. Callaway's control and was beyond his ability to "consent." Mr. Callaway did not "freely waive" his opportunity to avoid impoundment because he did not "freely waive" the opportunity to provide another driver, which depended on fortuitous circumstances out of Mr. Callaway's hands.

Additionally, there is no showing that the police gave Mr. Callaway any time to secure another driver. According to officer Quick, Mr. Callaway did not know anyone able to take custody "at that time," which certainly did not foreclose the possibility someone could be available in the near future.

Taken to its logical conclusion, this "holding"[5/] in Callaway would permit seizure of any vehicle, on consent grounds, where the driver is arrested and no one is present on the scene to take control of the car. Moreover,

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5/ The decision is sufficiently ambiguous that it is difficult to state with certainty that this basis is a holding.

this "holding" violates the well-settled rule relating to mere acquiescence.

The police demand to provide another driver or suffer impoundment was a claim of colorable authority that they indeed possessed the right of seizure. Without such a right, Mr. Callaway's failure to supply another driver could not have contributed to the police authority to seize. Thus, the analysis must ultimately focus on the right the police had to the car which as argued above was unsupportable.

As to the second possible basis for finding consent, the surrendering of the car keys is also but a classic example of mere acquiescence. The record is undisputed that at the point of relinquishment, the police were going to seize the car regardless of whether Mr. Callaway turned over the keys. If he had not turned over the keys, the car would have been towed to the impoundment lot at his expense.

Thus, the police were going to take the car in any event, under a claim of colorable authority. Mr. Callaway's alleged "consent" was

vitiated if the claim was invalid, which it was for reasons discussed at length above.

Consent should be found only after the facts are inspected "with the most careful scrutiny." Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973). The Wisconsin Supreme Court did not fulfill that mission. Mr. Callaway was never led to believe he had any choice in the matter. Quite the contrary: he was told in no uncertain terms the car would be seized. His only choice was as to the means of effectuating the seizure. Compare Dunaway v. New York, 442 U.S. 200, 207, n. 6 (1979) (request to come to police station may easily carry implication of obligation and amount to seizure of person); contrast, United States v. Mendenhall, 446 U.S. 544 (1980) (lead opinion: citizen consented to accompany officers who "was simply asked if she would accompany" them). Mr. Callaway was not simply asked if he would, or wanted, to give up his car. He was told he had to.

II. THE DECISION HEREIN ALSO CREATES A SERIOUS CONFLICT IN NEED OF RESOLUTION AS TO WHETHER AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE MUST BE CONDITIONED ON CONSENT OF A PRESENT OWNER OR USER - AN ISSUE LEFT OPEN BY THIS COURT IN OPPERMAN.

Once an automobile is lawfully impounded, it may be subjected to highly intensive, probing scrutiny, according to the Wisconsin Supreme Court: "[I]n view of the recognized purposes served by inventory we conclude that the better-reasoned cased authorize police inventory searches of locked and unlocked automobile trunks, glove compartments, and other compartments of a vehicle in which the owner might reasonably be expected to put personal effects or items of value." State v. Prober, 98 Wis.2d 345, 354, 297 N.W.2d 1, 6 (1980), indicating in an accompanying footnote, id., n. 6, that "other compartments" includes console and dashboard compartments and ash trays, but not fluid reservoirs or structural cavities unlikely to hold personal effects.

In the present case, the court relied on both Prober and Opperman to sanction the noncon-

sensual search of Mr. Callaway's locked glove compartment.[6] 106 Wis.2d at 515-518, 317 N.W.2d at 434-436. The court thus squarely rejected Mr. Callaway's contention - which is raised anew here -that where the owner of the impounded vehicle is present, an inventory search must be conditioned on his/her consent.[7]

Opperman does not lend necessary support to the Callaway-Prober holding, because in Opperman the owner was not present at the time of impoundment. Accordingly, this Court was not squarely faced with the present issue (which is another reason to grant certiorari). As Justice Powell's concurring opinion states, "the search

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[6] The police never asked Mr. Callaway for permission to conduct the inventory search; nor indeed did they even tell him a search was imminent.

[7] Mr. Callaway does not, of course, suggest there are identical limitations on a search when the police have probable cause to associate the car or its contents with criminal activity or some public hazard.

here was limited to an inventory of the unoccupied automobile." 428 U.S. at 380. See also Search and Seizure, § 7.4(a), pp. 570-571, stressing that the Opperman dissenters clearly favored a requirement of pre-inventory consent where the owner was accessible and that the plurality opinion was in no necessary disagreement.

The eighth circuit has also explained the inapplicability of Opperman to the present circumstance:

> [I]n Opperman, the Court noted that the car's owner "was not present to make other arrangements for the safekeeping of his belongings" and that the "inventory itself was prompted by the presence in plain view of a number of valuables inside the car." United States v. Opperman, supra, 428 U.S. at 375-76, 96 S.Ct. at 3100. Here, by contrast, the police offered no special justification for the search and Wilson was present during the search and capable of making other arrangements to safeguard his property. The police could have protected their interests as well as Wilson's without intruding into the privacy of the auto-mobile trunk. The police, for example, could have asked for Wilson's consent to search the car, or, in the alternative, requested that Wilson arrange to remove the car himself or to relieve police from liability for claims.

United States v. Wilson, 636 F.2d 1161, 1165 (8th Cir. 1980). Accord, State v. Mangold, 82

N.J. 575, 414 A.2d 1312, 1318 (1980) ("The absence of the vehicle owner was an express consideration in the Opperman court's assessment of the reasonableness of the inventory in that case").

The West Virginia Supreme Court has also held that Opperman is strictly limited to its facts, that is that the driver was not present at the time of impoundment to make arrangements for the car and belongings. Goff, 272 S.E.2d at 460. This court should resolve the conflict created by the broad extension of Opperman in Callaway.

As La Fave declares, id., "there is much to be said in favor of the proposition that the police should inventory the impounded vehicle when the owner or possessor is at hand only if he elects that alternative." Accord, State v. Mangold, 82 N.J. 575, 414 A.2d 1312 (1980); Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979); State v. Kilcrease, 379 So.2d 737 (La. 1980); United States v. Wilson, 636 F.2d 1161, 1165-1166 (8th Cir. 1980; State v. Sawyer, 571

P.2d 1131 (Mont. 1977). Other commentators unreservedly support this idea as well. Moylan, The Inventory Search of an Automobile: A Willing Suspension of Disbelief, 5 Univ. Balt. L.R. 203, 218 (1976); Comment, Chimel v. California: A Potential Roadblock to Vehicle Searches, 17 U.C.L.A. L.R. 626, 641 (1970).

The primary purpose of an inventory search is for the owner's benefit (i.e., protection of property while in police custody). Miller v. State, 403 So.2d 1307, 1311 Fla. 1981). There is no reason to deprive an arrestee of the right to waive a benefit purportedly for his/her benefit: "It would be anomalous to justify a search of an automobile to be for the owner's benefit, when the owner is available but does not consent to the search. Surely the property owner is an adequate judge of the treatment of the property that would benefit him." Sawyer, 571 P.2d at 1134. Accord, Moylan, 5 Univ. Balt. L.R. at 219 ("The failure to consult the wishes of the individual concerned makes a mockery of the claim that the search is in the interest of protecting personal property").

The other two policy arguments in favor of nonconsensual inventories (false claims and danger to the public) are equally meritless. The possibility of a false claim is eradicated if the police secure a waiver of liability as an alternative to a search. E.g., State v. Hatfield, 364 So.2d 578 (La. 1978) (this purported justification is "very hollow" if a driver is willing to forego protection of inventory search); Mangold, 414 A.2d at 1318 ("Absent consent. ... the vehicle owner or user will be presumed to have assumed the risk for any claims of property loss or theft arising from the impoundment").

Moreover, an inventory search will not prohibit someone from claiming that the inventory report itself was falsified. Boulet v. State, 17 Ariz. App. 64, 495 P.2d 504, 508-509 (1972). Further as the dissent states, "The majority cites no cases holding the police liable under such circumstances. Indeed, several courts have viewed this theory of liability with skepticism." 106 Wis.2d at 539; 317 N.W.2d at 446, cites omitted.

As to the final policy ground, there is absolutely no evidence in this record that the car or its contents presented a danger to the police or the public.

No court has yet held that there can be no privacy interest in a motor vehicle. Yet, that is the practical effect of Callaway. The Wisconsin Supreme Court made no attempt to even pay lip service to the existence of some privacy interest, no matter how limited it might be. After Callaway, a car can be seized without necessity or justification, and it can be searched virtually down to the wheel wells without particularized need. This court should apply its brakes to the unlimited application of police intrusion sanctioned by the Wisconsin Supreme Court .

> In short, an automobile is a constitutionally protected area in which the owner has a rightful expectation of privacy against unwarranted intrusion. An intrusion thrust upon him without his consent and sometimes against his express wishes in the guise of doing him a favor is, in most of its applications, an epic hypocrisy and is flagrantly unconstitutional.

Moylan, 5 U. Balt. L.R. at 220.

III. REVIEW IS NECESSARY TO DETERMINE WHETHER THE SCOPE OF AN INVENTORY SEARCH PROPERLY EXTENDS TO A LOCKED GLOVE COMPARTMENT.

The Opperman vehicle's glove compartment was unlocked, and its entry was prompted by valuables in plain view inside the car. Mr. Callaway's glove compartment, on the other hand, was locked.

There is no reason why the locked compartment could not simply have been inventoried as a unit. The eighth circuit has held that "unit inventories might better serve the interests of the Government by minimizing 'the possibility of loss and the possibility of false claims against police by the owner.' ... As long as the police could show the trunk was never open while in their custody, the owner would have no claim involving property in the trunk." Wilson, 636 F.2d at 1165-1166.

The justification for intrusion into the locked compartment was that it was the likely repository of highly personal items. 106 Wis.2d at 517; 317 N.W.2d at 436. That is precisely why the compartment was deserving of fourth

amendment protection. Cf. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted ___ U.S. ___ (1981) (lawful seizure of car did not give police authority to conduct warrantless search of either closed paper bag or zippered pouch). The analysis must focus on whether the container is a common repository for personal effects inevitably associated with the expectation of privacy. Id., 655 F.2d at 1173 (dissent), citing Arkansas v. Sanders, 442 U.S. 753, 762 (1979).

A locked compartment is no less a container for personal effects that a pouch or suitcase. It should have been inventoried as a unit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari and review the lower court ruling.

Respectfully submitted,

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